



STATE OF DELAWARE THE COURTS OF THE JUSTICES OF THE PEACE 820 North French Street, 11th Floor WILMINGTON, DELAWARE 19801

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LEGAL MEMORANDUM 80-3

TO:

ALL JUSTICES OF THE PEACE

STATE OF DELAWARE

FROM:

NORMAN A. BARRON

CHIEF MAGISTRATE

DATE:

July 2, 1980

RE:

AUDIO OR AUDIO-VIDEO RECORDINGS OF DEFENDANTS; ADMISSIBILITY OF

ISSUE: Is an audio or audio-video recording of a defendant charged with driving under the influence in violation of 21 Del.C. §4177 and recorded at a police station or at another public facility or place admissible evidence against said defendant?

ANSWER: Under certain circumstances, yes.

RATIONALE: Generally, you should permit audio or audio-video recordings of defendants charged with driving under the influence in violation of 21 Del.C., §4177 and recorded at a police station or at another public facility or place to be introduced into evidence against said defendants, provided that the police officer has satisfied you with regard to the following four (4) elements:

 The recording must be an accurate recording of what actually occurred;

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lincluded within the scope of this memorandum is one who operates or who has in actual physical control a vehicle while under the influence.

- 2. The recording is heard or heard and seen in its entirety;
- 3. The recording is authentic2; and
- 4. The recording is unadulterated in that there is no splicing or added commentary.

For example, in a 1973 Court of Common Pleas case, State v.

Bayard Austin, the Court ruled that an audio-video tape of the defendant could be introduced as evidence since the Court was satisfied that the tape was authentic, accurate, and unadulterated account of the defendant's physical condition and activities at the time it was taken.

The Court rules that the recording had to be shown in its entirety.

In the recent case of <u>State v. Harrison</u>, the Court of Common Pleas, Judge Bradley presiding, allowed an audio recording to be introduced by the State at the defendant's trial on a charge of driving under the influence. The audio reflected the defendant's slurred manner of speech. Said recording was made shortly after the defendant's arrest. Again, the Court, prior to admitting the recording, found it to have been accurate, authentic and unadulterated. The Court ordered that the entire recording be presented.

The reason why such a recording is admissible is because it is clear that a police officer may write down for official use his conversations with andobservations of a defendant charged with driving under the influence, and the officer may later testify concerning them. For constitutional purposes, no different result is required if the officer, in addition to taking notes of his conversation with and

²Authentication is a condition precedent to admissibility and is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. See: Rule 901(a) of the Delaware Uniform Rules of Evidence.

observation of a defendant under arrest for driving under the influence, records the conversation on audio equipment or records the conversations and visually captures them by means of audio-video equipment. As was stated in the case of <u>United States v. White</u>, 401 U.S. 745 (1971):

"If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations or privacy, neither does a simultaneous recording of the same conversation made by the agent . . "

On June 4, 1980, the Delaware Supreme Court issued its opinion in the case of Lewis v. State, Del. Supr., A.2d (1980). The case touched upon the issue under consideration. There, during an attempted murder of a police officer at a private residence, the telephone had been left off the hook and the entire incident was recorded on tape by the police at RECOM. On appeal, the defendant contended that the admission of the tape recording as evidence was error. The Supreme Court found no merit to the defendant's assertion, stating that:

"...[T]he tape recordings of the incident, despite distortions present during playback, was highly probative. The defendant does not dispute its accuracy, only its clarity. Allowing use of the tape as evidence was not an abuse of discretion."

What seems clear from the <u>Lewis</u> decision is that since our Supreme Court allowed use of a police recording of an incident from within a private residence, then clearly a police recording of a defendant while at a police station or in some other public facility or place would also be admissible as highly probative evidence of a defendant's alleged disability as a result of the consumption of alcohol or drugs.

In conclusion, provided the four (4) above-mentioned conditions are met, you should permit into evidence an audio or audio-video recording of a defendant charged with driving under the influence which was

recorded at a police station or at another public facility or place3.

³I note that the same conclusion reached herein was reached by Mort Kimmel, Esquire, in Weekly Newsletter No. 116 dated December 22, 1972. His opinion should be reviewed in conjunction with this memorandum.

NAB: CW

The Honorable Daniel L. Herrmann cc: The Honorable William Marvel The Honorable Albert J. Stiftel The Honorable Robert H. Wahl The Honorable Robert D. Thompson The Honorable Alfred Fraczkowski The Honorable Richard S. Gebelein The Honorable Lawrence M. Sullivan The Honorable William J. O'Rourke The Honorable Richard McMahon, State Prosecutor Harold Schmittinger, Esquire, Pres., Delaware State Bar Assoc. Vance A. Funk, III, Esquire, Chief Alderman John R. Fisher, Director, Administrative Office of the Courts Law Libraries: New Castle, Kent and Sussex Counties Files